

Commission in the *AT&T Non-Dominance Order*, where the Commission held that the central issue is whether a firm “has the ability to control price with respect to the overall relevant market.”¹¹⁰ The approach should not be adopted here.¹¹¹

Accordingly, BellSouth reiterates that any attempt by the Commission to subdivide the interexchange product market by services or classes of services would misstate the product market and would therefore be highly detrimental to the public interest. To the extent this would facilitate the imposition of “dominant carrier” regulation on, and the establishment or maintenance of entry barriers against, carriers viewed as having some degree of power with respect to particular services within the product market but without having market power, this is contrary to the 1996 Act. The Act was intended to break down the walls among services and service providers and facilitate free and open competition, not to restrain new competitors based on artificial product market definitions.

2. Relevant Geographic Market (NPRM ¶¶ 122-129)

The Commission also reiterates its tentative conclusion that although “we should generally continue to treat interstate, interexchange services as a single national market . . . there may be special circumstances that require us to examine an area smaller than the entire nation, for purposes of market power analysis.”¹¹² Applying this approach, the Commission concludes “we believe there are special circumstances that make it appropriate for us to examine an area smaller than the entire

¹¹⁰ *AT&T Non-Dominance Order*, 1 Com. Reg. (P & F) at 72; see BellSouth Comments in CC Docket No. 96-21 at 7-9. The FCC had to depart from its “all-services” approach in order to declare AT&T non-dominant, because it found that AT&T remains dominant in the provision of international services and has the ability to control prices in portions of the domestic interexchange services market. *AT&T Non-Dominance Order*, 1 Com. Reg. (P&F) at 92-93.; BellSouth Comments in CC Docket No. 96-21 at 7-8.

¹¹¹ *But see Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21, *Report and Order*, FCC 96-288 at ¶ 17 (released July 1, 1996) (“*Out-of-Region Order*”) (rejecting BellSouth’s arguments regarding the “all-services” approach).

¹¹² *NPRM* at ¶ 124 (citing *Interexchange NPRM* at ¶¶ 51-53).

nation for purposes of assessing the market power of a BOC affiliate.”¹¹³ Specifically, the Commission concludes that

[A]t this stage, the BOC’s current monopoly control of bottleneck facilities constitutes ‘credible evidence suggesting that there is or could be a lack of competition’ with respect to interstate, domestic, interLATA services originating in a BOC’s in-region area. Consequently, we tentatively conclude that we should evaluate a BOC’s point-to-point markets in which calls originate in-region separately from its point-to-point calls which originate out-of-region, for the purpose of determining whether a BOC interLATA affiliate possesses market power in the provision of in-region, interstate, domestic, interLATA services.¹¹⁴

For the reasons previously articulated by BellSouth in its *Interexchange* comments,¹¹⁵ summarized below, BellSouth disagrees with the Commission’s conclusion and believes the relevant geographic market should continue to be nationwide.

The Commission’s proposal to revise its definition of the relevant geographic market for purposes of assessing the market power of a BOC affiliate is based upon the flawed assumption that because BOCs control access facilities in their local service areas,¹¹⁶ they may have market power over in-region interexchange services and therefore may need to be examined individually.¹¹⁷ Nevertheless, starting with zero market share in the interLATA exchange market, the BOC has no ability to raise interexchange service prices in the in-region interLATA exchange market. To the

¹¹³ *NPRM* at ¶ 124.

¹¹⁴ *NPRM* at ¶ 126.

¹¹⁵ See BellSouth Comments (Phase I) in CC Docket No. 96-61 at 15-20.

¹¹⁶ The Commission makes the flawed assumption that local access is a product market in which LECs such as the BOCs necessarily have a monopoly. This is not the case. There are significant alternative sources in the area of high-capacity transport, namely the “local access to business” market. BellSouth has lost significant share to such competitors in Atlanta, Orlando, and Miami, for example.

¹¹⁷ See BellSouth Comments (Phase I) in CC Docket No. 96-61 at 15-16; *Interexchange NPRM* at ¶ 36.

contrary, BOC entry into the interstate interexchange oligopoly market is certain to improve the competitive performance of that market, thereby lowering prices.¹¹⁸ Furthermore, the Commission has previously found that “substantial competition exists with respect to most interstate, domestic, interexchange service offerings.”¹¹⁹

The Commission appears to conclude that because BOC LECs providing local exchange services are regulated as dominant carriers (and thus must provide local exchange access at tariffed rates pursuant to Title II of the Communications Act), this dominance in the local exchange service market constitutes a reasoned basis for classifying BOC affiliates as dominant for in-region interLATA service. BellSouth disagrees. The possibility that a BOC may have power in some assumed local exchange access business that is an input into interstate interexchange service in no way suggests that its entry into the interstate interexchange market would allow it to monopolize that market.

Moreover, the big three IXC—AT&T, MCI, and Sprint—are currently regulated as nondominant carriers in the provision of interstate interexchange service, despite the fact that they control in aggregate about 85% of long distance markets.¹²⁰ BellSouth has previously demonstrated in the *Interexchange Proceeding* that there is extensive evidence that the incumbent IXCs have long engaged in tacit price coordination with respect to residential services and that even their business rates have been less than fully competitive.¹²¹ The Commission itself has stated that “the best solution” to any tacit price coordination that may exist is the fact that the 1996 Act “allow[s] for

¹¹⁸ See BellSouth Comments (Phase II) in CC Docket No. 96-61 at 4-16 & appendices.

¹¹⁹ See *NPRM* at ¶ 118.

¹²⁰ See Declaration of Prof. Jerry A. Hausman (“Hausman Declaration”) at 6-7, appended as Exhibit A to BellSouth Comments (Phase II) in CC Docket No. 96-61.

¹²¹ See BellSouth Comments (Phase II) in CC Docket No. 96-61 at 4-16 & appendices.

competitive entry in the interstate interexchange market by the facilities-based BOCs and others.”¹²²

The Commission should not now erect additional barriers to competitive entry by imposing dominant carrier regulation on BOC affiliates, but should eliminate barriers to competitive entry and end the incumbents’ ability to engage in tacit collusion.

Furthermore, as shown below, a BOC’s ability to leverage the market arising from control of its access facilities is restrained by the non-accounting and nondiscrimination safeguards imposed by Section 272, as well as the Commission’s price cap and access charge regulations.¹²³ The price cap regulations in particular eliminate any ability or incentive to cross-subsidize interLATA service, since the price-capped affiliate cannot raise prices on other services to support underpriced interexchange service, either in-region or out-of-region. The entry of other BOCs into the provision of interexchange service out of their home regions¹²⁴ will also place constraints on a BOC’s ability to control interexchange prices in-region.

To the extent the Commission’s relevant geographic market proposal is an attempt to redefine the current nationwide geographic market on a regional basis in order to pre-ordain that the

¹²² *Interexchange NPRM* at ¶ 89.

¹²³ See *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, *First Report and Order*, 10 F.C.C.R. 8962 (1995); see also *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 5 F.C.C.R. 6786 (1990), *recon.*, 6 F.C.C.R. 2637 (1991), *aff’d sub nom. National Rural Telecom Assoc. v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

¹²⁴ The Commission recently found that, on an interim basis, if a BOC chooses to offer out-of-region interstate interexchange services directly, it will be subject to dominant carrier regulation. If, however, the BOC provides out-of-region domestic, interstate, interexchange services through an affiliate in a manner that satisfies the separation requirements imposed on independent LECs in the *Fifth Report and Order* in the *Competitive Carrier Proceeding*, then Commission will remove dominant carrier regulation. See *Out-of-Region Order*, FCC 96-288 at ¶¶ 19-25. Nevertheless, in the pending *Interexchange Proceeding*, initiated virtually simultaneously with the *Out-of-Region* proceeding, the Commission has proposed to eliminate the separation requirements which have now been imposed as a condition for non-dominant treatment of BOCs for the provision of out-of-region interstate, interexchange services. See *Interexchange NPRM* at ¶ 61. BellSouth supports the Commission’s proposal to eliminate the interim separation requirement imposed on BOCs to provide such services on a non-dominant basis.

BOC provision of in-region long distance service will be labeled dominant, BellSouth restates herein that it is arbitrary and capricious and contrary to the public interest. As BellSouth previously showed in the *Interexchange* proceeding, the Commission is proposing a different set of regulatory standards for the current new entrants into the long distance arena—the BOCs—than it applied just last year in facilitating AT&T’s provision of interexchange service without dominant-carrier regulation. To do so would be to expressly reject the Commission’s previous conclusion with regard to AT&T: “We see no basis for determining whether AT&T is non-dominant *under a different standard than that used for classifying its competitors.*”¹²⁵

Competing carriers should be subject to the same standards, except where there are compelling reasons for a lack of regulatory parity. The overriding objective of the 1996 Act was to open the door to evenhanded competition among all comers without unnecessary regulatory handicapping, not to stack the deck against new entrants.¹²⁶ Thus, the Commission should reject any proposal, such as the revisions to the relevant market definitions under consideration here, which may result in a competitive advantage for one carrier over another. Such a result would be inconsistent with the 1996 Act, which “seeks to provide for a procompetitive, de-regulatory national policy framework . . . by opening all telecommunications markets to competition.”¹²⁷

B. BOCs Should be Regulated as Non-Dominant for In-Region, Interstate, Domestic, InterLATA Services (NPRM ¶¶ 130-152)

In the Commission’s *Competitive Carrier Proceeding* it distinguished between carriers with market power, termed “dominant” carriers, and those without market power, designed “non-dominant” carriers.¹²⁸ For purposes of assessing dominance, the Commission has defined market

¹²⁵ *AT&T Non-Dominance Order*, 1 Com. Reg. (P & F) at 72 (emphasis added).

¹²⁶ *See* Conference Report at 1.

¹²⁷ *Interexchange NPRM* at ¶ 1 (quoting Conference Report at 1).

¹²⁸ *See* 47 C.F.R. § 61.3(o), (t).

power as either “the ability to raise prices by restricting output” or “the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.”¹²⁹ Based on the foregoing, the Commission noted in the *NPRM* that there are two ways in which a carrier can profitably raise and sustain prices above competitive levels and thereby exercise market power.

First, a carrier having a large market share may be able to raise and sustain prices by restricting its own output.¹³⁰ Second, a carrier may be able to raise and sustain prices by increasing its rivals’ costs or by restricting its rivals’ output through the carrier’s control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services.¹³¹ The Commission has asked, with respect to both types of market power, whether the BOC affiliates should be classified as dominant or non-dominant.¹³² The Commission has stated that in order to relax the dominant carrier regulation that would currently apply to BOC provision of in-region interLATA services, it must determine “that the BOC affiliates will not possess market power in the provision of those services in the relevant product and geographic markets.”¹³³ As shown below, BellSouth submits that BOC affiliates should be classified as non-dominant because BOCs are unable to exercise market power under these standards as established by the Commission.

¹²⁹ *Competitive Carrier Proceeding, Fourth Report and Order*, 95 FCC 2d at 558.

¹³⁰ *See NPRM* at ¶ 131.

¹³¹ *See NPRM* at ¶ 131.

¹³² *See NPRM* at ¶ 132.

¹³³ *NPRM* at ¶ 130.

1. With a Zero Market Share in In-Region InterLATA Services, BOCs Lack Ability to Raise and Sustain Prices By Restricting Output (*NPRM* ¶ 133)

In considering whether a BOC affiliate could raise its prices by restricting its own output, the Commission looks to the ability of BOCs to use or leverage their market power in the local exchange and exchange access markets to such an extent that their interLATA affiliates could profitably raise and sustain prices of in-region, interstate, domestic, interLATA services significantly above competitive levels by restricting their own output. BellSouth agrees with the Commission that because “each BOC affiliate will initially have a zero market share in the provision of in-region, interstate, domestic, interLATA services . . . the affiliate initially will not be able to profitably raise and sustain its price by restricting its output.”¹³⁴

Even in the future if BOC affiliates begin to exercise a market presence in the provision of in-region interLATA service, their ability to restrict their own output to raise prices above competitive levels will be restrained by existing competition. As noted by the Commission, “since all interLATA customers currently are served by the affiliates’ competitors and could continue to be served by them after BOC affiliates enter the domestic interLATA market, we believe that the availability of this transmission capacity will constrain the BOC affiliates’ ability to raise its domestic interLATA prices.”¹³⁵ Finally, BellSouth agrees with the Commission that “the cost structure, size, and resources of BOC affiliates are not likely to enable them to raise prices for their domestic interLATA services.”¹³⁶

¹³⁴ *NPRM* at ¶ 133.

¹³⁵ *NPRM* at ¶ 133.

¹³⁶ *NPRM* at ¶ 133.

2. Existing Safeguards and Competition Are Sufficient to Protect Against Potential Improper Allocation of Costs or Unlawful Discrimination (*NPRM* ¶¶ 134-140)

Nevertheless, the Commission remains concerned about the “possibility” that a BOC affiliate “would quickly achieve the ability to raise price by restricting output” through its “control of bottleneck access facilities.”¹³⁷ The Commission states that this could manifest itself in one of two ways. First, a BOC affiliate providing interLATA services could improperly recover part of its costs from the BOC’s local exchange and exchange access services, thereby enabling it to price its interLATA services below cost, drive out its interLATA competitors, and then raise and sustain retail prices above competitive levels.¹³⁸ Second, a BOC could potentially use its local exchange and exchange access market power to discriminate in favor of its own affiliate and against its affiliate’s interLATA competitors. BellSouth submits that the safeguards in the 1996 Act, coupled with other existing regulations and the current state of competition within the relevant market, will sufficiently constrain a BOC’s potential to improperly allocate costs or discriminate unlawfully.

(a) Improper Allocation of Costs (*NPRM* ¶¶ 134-138)

Commission concerns regarding the improper allocation of costs by BOCs are obviated by three factors: (1) the safeguards imposed by Section 272 of the 1996 Act; (2) the Commission’s existing price cap regulation of BOC access services and access charge rules; and (3) the presence of sufficient competition in the interstate, domestic, interLATA telecommunications services marketplace.

First, Section 272 requires that a BOC must establish a separate affiliate to “operate independently” in order to provide in-region telecommunications services.¹³⁹ The separate affiliate

¹³⁷ *NPRM* at ¶ 133-34.

¹³⁸ *NPRM* at ¶ 135.

¹³⁹ 47 U.S.C. § 272(b)(1).

must maintain separate books, records, and accounts from that of the BOC; must have separate officers, directors and employees than the BOC; may not obtain credit which would permit a creditor to go after the assets of the BOC upon default; and shall conduct business with the BOC on an “arms length basis” with any transaction reduced to writing and made publicly available.¹⁴⁰ Further, a BOC may provide interLATA services through its separate affiliate only “so long as the costs are appropriately allocated.”¹⁴¹ Finally, BOCs must account for all transactions with their separate affiliates “in accordance with accounting principles designated or approved by the Commission.”¹⁴² BellSouth believes these safeguards will prevent improper cost allocations by the BOCs.

By mandating the use of separate employees, the cost of each employee will be attributed directly to the appropriate entity, rather than potentially being improperly passed on to the BOC and its local exchange customers to the benefit of the affiliate. In addition, the requirement to maintain separate records and document all transactions between the BOC and its affiliate also discourages improper cost allocations and provides a means for detection of improper cost allocation. BellSouth thus concurs with the Commission that “these safeguards will constrain a BOC’s ability to improperly allocate costs.”¹⁴³

Second, existing price cap regulation of BOC access services will also serve to prevent improper recovery by a BOC of the costs incurred by its interLATA affiliate. The Commission has previously correctly noted that “[b]ecause price cap regulation severs the direct link between

¹⁴⁰ 47 U.S.C. § 272(b)(2)-(5).

¹⁴¹ 47 U.S.C. § 272(e)(4).

¹⁴² 47 U.S.C. § 272(c)(2). The Commission has sought comment on how to implement this accounting safeguard in a separate pending proceeding. *See Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, *Notice of Proposed Rulemaking*, FCC 96-309, at ¶ 69 (released July 18, 1996).

¹⁴³ *NPRM* at ¶ 135.

regulated costs and prices, a carrier is not able to recoup misallocated nonregulated costs by raising basic service rates, thus reducing the incentive for the BOCs to allocate nonregulated costs to regulated services.”¹⁴⁴ This conclusion remains applicable today.

Finally, a BOC’s ability to engage in predatory pricing even in the absence of the statutory and regulatory constraints discussed above is highly dubious in light of the nationwide competitive presence of the big three IXCs. As the Commission noted, it is unlikely that a BOC affiliate “could drive one or more of these companies [AT&T, MCI and Sprint] from the market,” and even if it could, it is unlikely “the BOC affiliate would later be able to raise prices in order to recoup lost revenues.”¹⁴⁵

Given that a BOC does not have the ability to engage in the pricing tactics that concern the Commission, imposing dominant carrier status on the BOCs to prevent against this improbable specter would not constitute reasoned decisionmaking. Given the tremendous costs that dominant carrier status would impose on BOCs’ provision of interexchange service, and the impairment on competition that would result, this measure is clearly unwarranted merely because of the hypothetical possibility that BOCs might engage in improper pricing tactics.

(b) Unlawful Discrimination (NPRM ¶¶ 139-140)

The Commission is also concerned that a BOC could use its local exchange and exchange access market power to discriminate in favor of its interLATA affiliate by providing poorer quality exchange access services to its affiliate’s interLATA competitors or by unnecessarily delaying the access of such competitors to the local network.¹⁴⁶ However, Section 272 specifically sets forth non-

¹⁴⁴ NPRM at ¶ 136 (quoting *BOC Safeguards Order*, 6 F.C.C.R. 7571, 7596 (1991), *vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995)).

¹⁴⁵ NPRM at ¶ 137.

¹⁴⁶ NPRM at ¶ 139.

discrimination safeguards applicable to the BOC provision of in-region interLATA telecommunications services. Specifically, a BOC

- is specifically prohibited from discriminating against unaffiliated carriers by delaying their requests for exchange service and exchange access;¹⁴⁷
- cannot provide facilities, services, or information concerning its provision of exchange access to its affiliate unless it makes the same available to other competing providers of interLATA services “on the same terms and conditions;”¹⁴⁸ and
- is required to charge its affiliate an amount for access to its telephone exchange service and exchange access that is “no less than the amount [that the BOC charges] any unaffiliated interexchange carriers for such services.”¹⁴⁹

From a policy standpoint, after a BOC begins to provide interLATA services in-region there is no reason to believe that it would provide poorer or delayed access to its competitors in favor of its own long-distance service. BellSouth showed in its *Interexchange* comments that such concerns are primarily vestiges of the pre-divestiture era, when AT&T, with over 95% of the interexchange market, used its control of the local exchange to disadvantage its interexchange competitors.¹⁵⁰ Since divestiture, AT&T and other large IXC's have obtained access to the local exchange, and the BOCs will be the newcomers as far as purchasing access is concerned.

Moreover, the Commission has (and will continue to have) access charge rules in place, and the BOCs are obliged to provide equal access to all interexchange carriers. There is no reason to believe that the Commission would eliminate these existing obligations for the provision of access as the BOCs enter the interexchange arena. Finally, the access charges paid by IXC's are a major source of revenue for the BOCs. They have no incentive—and indeed have a significant disincentive—to jeopardize this revenue source by providing inferior access, or denying it

¹⁴⁷ 47 U.S.C. § 272(e)(1).

¹⁴⁸ 47 U.S.C. § 272(e)(2).

¹⁴⁹ 47 U.S.C. § 272(e)(3).

¹⁵⁰ See BellSouth Comments (Phase I) in CC Docket No. 96-61 at 21-22.

altogether, especially in light of the emergence into the access provision arena by alternative local exchange carriers and competitive access providers.

3. Existing FCC Price Cap Rules Restrain BOCs in their Ability to Use or Leverage their Local Exchange Market Power to Raise Rivals' Costs (NPRM ¶ 141)

The Commission states that in addition to its concerns regarding improper cost allocation and discrimination, a BOC has the potential to unilaterally raise the price of access to all interexchange carriers, including its affiliate.¹⁵¹ According to proposed theory, this would lead competing interLATA carriers to raise their rates to remain profitable, while the BOC affiliate could theoretically keep its rates constant and capture additional market share. Even though the BOC affiliate would not receive a profit, the BOC as a whole would post increased gains through the higher access charges. Obviously, this is a highly theoretical scenario. In any event, the Commission's existing price cap regulation of the BOCs' access services will serve to prevent a BOC from engaging in this sort of behavior, as the Commission noted.¹⁵² Further constraints are unnecessary.

C. The Commission Should Adopt the Same Classification for International and Domestic Services (NPRM ¶¶ 150-151)

Finally, the Commission has asked whether to apply the same regulatory classification to the BOC affiliates' provision of in-region, international services as it adopts for their provision of in-region, interstate, domestic, interLATA services. Specifically, the Commission requests comment on whether a BOC affiliate should be regulated as dominant in the provision of in-region, international services because of the BOC's current retention of bottleneck facilities on the U.S. end

¹⁵¹ See *NPRM* at ¶ 141.

¹⁵² See *NPRM* at ¶ 141.

of an international link.¹⁵³ BellSouth agrees with the Commission that there are “no practical distinctions between a BOC’s ability and incentive to use its market power in the provision of local exchange and exchange access services to improperly allocate costs, discriminate against, or otherwise disadvantage unaffiliated domestic interexchange competitors as opposed to international service competitors.”¹⁵⁴ Accordingly, for the same reasons stated above, BOC affiliates should be classified as non-dominant in the provision of in-region, international services.

¹⁵³ See *NPRM* at ¶ 150.

¹⁵⁴ *NPRM* at ¶ 141.

CONCLUSION

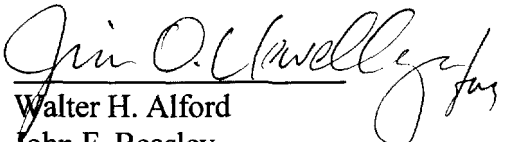
Every “safeguard” that the Commission imposes on the BOCs carries with it substantial costs, which reduce efficiencies and impair competition. Thus, such safeguards will impose costs on consumers and deprive them of the benefits of efficient provision of service in the most highly competitive manner. Accordingly, safeguards should be imposed only when the Commission is certain that their benefits outweigh their costs.


Congress has already, for the most part, conducted that balancing. The Commission should carry out the will of Congress without adding new regulation of its own. Structural regulations such as the Commission has proposed are not only unwise, they are contrary to the scheme established by Congress.

Accordingly, BellSouth urges the Commission not to adopt the regulations it has proposed and instead simply codify the provisions of the 1996 Act into its rules. BellSouth also urges the Commission to declare the BOCs non-dominant in the provision of interLATA services, thereby paving the way for the competitive provision of integrated local and interLATA services by BOCs as well as interexchange carriers, as Congress intended.

Respectfully submitted,

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August 15, 1996

CERTIFICATE OF SERVICE

I, Donna M. Crichlow, hereby certify that copies of the foregoing "Comments of BellSouth" in CC Docket No. 96-149 were served via hand delivery, this 15th day of August, 1996, to the persons listed below.

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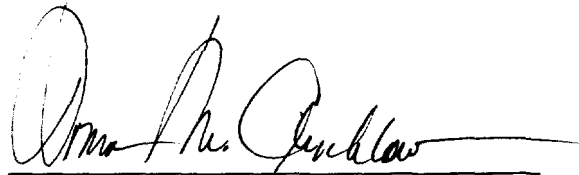
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